

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

* * * * * C.R. NO. 04-100ML
*
UNITED STATES OF AMERICA *
*
VS. * SEPTEMBER 19, 2005
* 10:00 A.M.
*
JOEL FRANCISCO *
*
* * * * * PROVIDENCE, RI

BEFORE THE HONORABLE MARY M. LISI,
DISTRICT JUDGE

(Sentencing)

APPEARANCES:

FOR THE GOVERNMENT: MARY E. ROGERS, ESQ.
STEPHEN G. DAMBRUCH, ESQ.
U.S. Attorney's Office
50 Kennedy Plaza
Providence, RI 02903

FOR THE DEFENDANT: DAMON D'AMBROSIO, ESQ.
160 Plainfield Street
Providence, RI 02909

Court Reporter: Karen M. Zinni, RPR-RMR-CRR
One Exchange Terrace
Providence, RI 02903

Proceeding reported and produced by computer-aided
stenography

I N D E XGOVERNMENT WITNESSPAGERobert Enright

Direct Examination by Ms. Rogers

21

Cross-Examination by Mr. D'Ambrosio

30

Redirect Examination by Ms. Rogers

38

E X H I B I T SGOVERNMENTFOR IDIN FULL

1

24

1 19 SEPTEMBER 2005 -- 10:00 A.M.

2 THE COURT: This is the matter of the United
3 States versus Joel Francisco. The matter is before the
4 Court this morning for imposition of sentence.

5 The probation officer has completed the
6 pre-sentence report and has done both a guidelines
7 calculation and also a recommendation with respect to
8 the statutorily required sentence to be imposed in this
9 case and that is of life imprisonment with respect to
10 Count II. As to Count III -- Count I, rather, the
11 guideline range is 360 months to life in prison.

12 I know that the Defendant, through counsel, has
13 made certain objections to the pre-sentence report; and
14 I'll ask you, Mr. D'Ambrosio, whether in view of the
15 statutorily required sentence in this case you're
16 pressing those objections this morning.

17 MR. D'AMBROSIO: I am, your Honor.

18 THE COURT: Okay. Have you had an opportunity
19 to review the pre-sentence report with your client?

20 MR. D'AMBROSIO: I have, your Honor.

21 THE COURT: Okay. Before I address your
22 objections, Ms. Rogers, have you had an opportunity to
23 review the pre-sentence report?

24 MS. ROGERS: Yes, your Honor.

25 THE COURT: I received this morning the

1 Government's response to the Defendant's objections.
2 Mr. D'Ambrosio, have you had an opportunity to review
3 the Government's response?

4 MR. D'AMBROSIO: I have not, your Honor.

5 THE COURT: You have not?

6 MR. D'AMBROSIO: I have not.

7 THE COURT: Well, do you have it?

8 MR. D'AMBROSIO: No, I don't.

9 THE COURT: You mailed it on Friday?

10 MS. ROGERS: Yes, your Honor.

11 MR. D'AMBROSIO: My office doesn't receive mail
12 on Saturdays, Judge.

13 THE COURT: Well, why don't you give him a copy,
14 and we'll recess for a half hour so you can read it.

15 MR. D'AMBROSIO: Your Honor, may I be heard on
16 one other matter? I'm speaking particularly of the
17 lateness of this proceeding.

18 The Court will note within the parameters of the
19 Defendant's objections to the pre-sentence report I
20 have referenced a certain post-conviction application
21 being made on each of the predicate offenses which give
22 rise to this.

23 These matters came on in the Superior Court last
24 Wednesday and Thursday on the state's motion to dismiss
25 each of those. Both of those motions to dismiss were

1 denied, and they are presently scheduled for decision
2 on September 30th before Magistrate McAtee. I found
3 this out Thursday afternoon.

4 Again, due to the lateness of it, I haven't had
5 time to file a written request; but I would be moving
6 for a continuance if the Court would entertain it.

7 THE COURT: Why didn't you just call us,
8 Mr. D'Ambrosio?

9 MR. D'AMBROSIO: Judge, I thought because of the
10 lateness of the --

11 THE COURT: Pick up the telephone and call
12 somebody.

13 MR. D'AMBROSIO: Yes, Judge.

14 THE COURT: You've got all these people in here
15 today. You've got your client here, the Government
16 here and the Court.

17 MR. D'AMBROSIO: Yes, your Honor.

18 THE COURT: It's a waste of everybody's time,
19 isn't it?

20 MR. D'AMBROSIO: I think it would be dependent
21 upon the Court's ruling on the motion. It may be,
22 Judge. I apologize, but I thought it would be more
23 appropriately addressed to the Court here. It was a
24 bad error of judgment on my part. I'll accept that
25 responsibility, your Honor.

1 THE COURT: What motion is it that's pending in
2 state court? You had requested a continuance from this
3 court, which I gave you.

4 MR. D'AMBROSIO: That is correct, your Honor.

5 THE COURT: What motion is pending?

6 MR. D'AMBROSIO: There are two applications for
7 post-conviction relief. They are pending before
8 Magistrate McAtee for a decision and review of the
9 transcript on September 30th.

10 THE COURT: What relief are you asking for in
11 state court?

12 MR. D'AMBROSIO: That each of the convictions,
13 sentences in those cases be vacated and the matters be
14 reassigned for either pretrial conference or trial.

15 THE COURT: Did he serve sentences on those
16 cases?

17 MR. D'AMBROSIO: Yes, Judge. Well, sentence was
18 imposed.

19 THE COURT: Were they convictions after a trial
20 or upon a guilty plea?

21 MR. D'AMBROSIO: Each was upon a plea of nolo
22 contendere in state court.

23 THE COURT: Were they counselled pleas?

24 MR. D'AMBROSIO: Yes, they were, your Honor.

25 THE COURT: Approach. Barry.

1 (Bench conference held on the record)

2 THE COURT: Tell me again procedurally what the
3 state filed on those cases.

4 MR. D'AMBROSIO: The state, per its counsel,
5 filed a motion to dismiss the Petitioner's application
6 for post-conviction relief seeking to vacate the
7 judgment and sentence imposed on each of those cases.
8 Each was a simple possession charge.

9 THE COURT: A simple possession?

10 MR. D'AMBROSIO: A simple possession charge.
11 Those are the two predicate offenses here.

12 THE COURT: And so tell me what happened with
13 the state's motion.

14 MR. D'AMBROSIO: The state's motion, the state
15 actually withdrew its motion, so it was not being
16 pressed, and the matter's been assigned for decision.

17 THE COURT: Oh, that's different. Then it
18 wasn't dismissed by the Court. You told me that the
19 Court dismissed the motion.

20 MR. DAMBRUCH: I spoke to Assistant Attorney
21 General Stacey Veroni who is representing the State of
22 Rhode Island in that matter, and my understanding is
23 that the motion to dismiss was filed based upon the
24 fact that Defendant had not filed appropriate paperwork
25 to pursue these proceedings.

1 The Defendant was given some additional time by
2 the Court, still hadn't filed the paperwork, so the
3 motion was set down for hearing. Apparently now
4 Mr. D'Ambrosio has satisfied the requirement of just
5 filing the appropriate paperwork. This was not a
6 motion based upon the merits.

7 Furthermore, in speaking to Miss Veroni, she
8 advised me the Defendant was counselled on both of
9 these pleas, I believe. It was by Attorney David
10 Cooper.

11 MR. D'AMBROSIO: That's correct.

12 MR. DAMBRUCH: He's private counsel. These
13 things happened some time ago. There's been no
14 complaint with regard to the sufficiency of the
15 evidence or the voluntary and knowing nature of the
16 plea up until the point that he's now convicted; and
17 because he's facing a life sentence, he wants to
18 relitigate these matters.

19 So any delay that has occurred with the
20 post-conviction relief I would argue is directly
21 attributable to the Defendant in that he failed to --
22 first, waited a whole lot of time before moving at all
23 and then, secondly, failed to file the appropriate
24 paperwork until the state basically forced his hand by
25 way of a motion to dismiss.

1 THE COURT: Barry, tell me where in the report
2 you talk about the statutory penalty. Is it referenced
3 in any of the body of the report?

4 THE PROBATION OFFICER: It should be on that
5 page I believe you're looking at now, Judge.

6 THE COURT: Those are the enhanced penalties.
7 Is it based on him having two prior drug trafficking
8 offenses?

9 THE PROBATION OFFICER: It's based on the motion
10 that the Government filed for this case.

11 MR. DAMBRUCH: The statute requires two prior
12 felony drug convictions, and the Government filed an
13 851 Information, your Honor, citing to and including
14 certified copies of those convictions in support of its
15 position.

16 THE COURT: Okay. Tell me which ones they are.

17 MR. DAMBRUCH: If I may have a moment, we have
18 the document here.

19 (Pause)

20 MR. DAMBRUCH: Your Honor, the two convictions
21 at issue are the February 4, 1998, conviction for
22 possession of cocaine.

23 THE COURT: Just a minute.

24 MR. DAMBRUCH: Which is on page 8 of the report,
25 your Honor.

1 THE COURT: Was it simple possession?

2 MR. DAMBRUCH: It was, your Honor, yes.

3 THE COURT: And that counts?

4 MR. DAMBRUCH: It does, your Honor. The statute
5 requires conviction for a prior felony drug offense.
6 It does not require that there be any involvement of
7 distribution.

8 THE COURT: Okay.

9 MR. DAMBRUCH: The second conviction follows
10 immediately after on page 8. It's --

11 THE COURT: Paragraph 33?

12 MR. DAMBRUCH: That's correct, your Honor, yes.
13 Those are two separate cases that were disposed of
14 before the Superior Court.

15 THE COURT: Okay. And this is by virtue of
16 Section 851?

17 MR. DAMBRUCH: By virtue of Section 851 is the
18 section that allows us to move, and then the language
19 with regard to the prior felony drug conviction is
20 841(a)(1) and (b)(1)(A).

21 THE COURT: So he pled out on those, he was
22 represented by counsel, he served the sentence and you
23 have a motion for what?

24 MR. D'AMBROSIO: An application for
25 post-conviction relief under the Rhode Island General

1 Laws. Essentially both of the cases have probable
2 cause issues, I would say. That's the sum and
3 substance of each of the cases.

4 In one case he was stopped on the street corner,
5 told to raise his hands without any wrongdoing. In
6 another he was taken out of the passenger side of a
7 vehicle, patted down. Apparently it was -- I'm trying
8 to recall if it was a hard object in his pocket, and
9 another bag of cocaine was found.

10 THE COURT: I don't know whether the state court
11 is going to grant you the relief you're asking for.
12 You're telling me the state is opposing the motion on
13 the merits?

14 MR. DAMBRUCH: Absolutely, your Honor. These
15 were counselled pleas that occurred in 1998.

16 THE COURT: Okay. All right. I'm going to deny
17 your request for a continuance today. It seems to me
18 that you can bring these proceedings on a parallel
19 vein. I'll impose sentence today.

20 You've got a year from today, I think, to come
21 back and file a motion in this case if you're
22 successful over there; but I think to put this off any
23 longer, I've already given you -- didn't I give you
24 about 60 days or so?

25 MR. D'AMBROSIO: You did, your Honor. That's

1 why I thought the Court would rule in this fashion.

2 THE COURT: But, seriously, if you're going to
3 ask for a continuance, don't bring all these people in
4 here. I would have been more inclined to give you a
5 couple of weeks if you had called in on Thursday and
6 told us what the story was.

7 MR. D'AMBROSIO: Your Honor, may I ask one other
8 thing? The Court has given me some time to look at the
9 Government's response, and I'm grateful. Speaking with
10 the Government today, I believe the Government may be
11 looking toward going into evidence. I was not aware
12 this was going to be an evidentiary hearing today.

13 THE COURT: Well, you're objecting to two parts
14 of the pre-sentence report, one, his gang affiliation
15 and, two, obstruction and, three, I guess, the third is
16 whether or not he was a leader.

17 The gang affiliation doesn't affect the
18 guidelines computation, but whether or not he was a
19 leader and whether or not he obstructed justice
20 certainly affects the guidelines computation. So it
21 seems to me the only way they can prove that is to put
22 evidence in.

23 MR. D'AMBROSIO: Okay. That's fine. I just
24 wasn't --

25 THE COURT: So why don't you take a few minutes

1 and read the Government's objection to or response to
2 your objections, and then I'll come out and continue
3 this.

4 MR. DAMBRUCH: Thank you, Judge.

5 (End of bench conference)

6 (Recess)

7 THE COURT: Mr. D'Ambrosio, have you now had an
8 opportunity to review the Government's response to your
9 objections to the pre-sentence report?

10 MR. D'AMBROSIO: I have, your Honor. Thank you.

11 THE COURT: And you're prepared to go forward?

12 MR. D'AMBROSIO: Yes, your Honor please.

13 THE COURT: I'll take up each of your objections
14 in order.

15 MR. D'AMBROSIO: Yes, your Honor.

16 THE COURT: Would you come up to the podium,
17 please. The first objection that you have really does
18 not affect the guidelines calculation.

19 MR. D'AMBROSIO: That's correct, Judge.

20 THE COURT: And so -- and the Government's
21 response indicates that there are three other
22 Indictments pending against this Defendant, and so the
23 probation officer correctly wrote that there are
24 pending or, rather, related cases.

25 Your second objection relates to a statement in

1 the prosecution version.

2 MR. D'AMBROSIO: That is correct.

3 THE COURT: Are you pressing that objection?

4 MR. D'AMBROSIO: Yes, your Honor please.

5 THE COURT: Okay. And, Ms. Rogers, is this one
6 of the matters that you're prepared to present evidence
7 on this morning?

8 MS. ROGERS: Yes, your Honor.

9 THE COURT: Okay. We'll hold that, then,
10 pending the Government's opportunity to present
11 evidence. My recollection, Mr. D'Ambrosio, is that the
12 Government purposefully withheld that evidence during
13 trial because it was more prejudicial than probative in
14 that particular case.

15 Your third objection relates to paragraph number
16 12, and that one I guess the Government also is
17 intending to offer evidence on. Is that right,
18 Ms. Rogers?

19 MS. ROGERS: Your Honor, I have gone over this
20 with the officer who testified as well as the assisting
21 detective during the trial, and that evidence was
22 presented during the trial. We're prepared to offer it
23 again but in order to initially save time offer or ask
24 the Court to take judicial notice of the record.

25 THE COURT: Well, do you have a copy? This case

1 was tried so long ago, I honestly don't have a
2 recollection of what that testimony was. Do you have a
3 transcript?

4 MS. ROGERS: No, your Honor. Then we'll simply
5 put the officer on the stand.

6 THE COURT: Then you're going to have to put him
7 on. And your next one, you object to the four-level
8 increase at paragraph number 17 for an aggravating role
9 in the offense, and I take it that the Government has
10 or is intending to put evidence on to that effect as
11 well.

12 MS. ROGERS: Yes, your Honor. Also, the
13 Government would be asking at the time that the Court
14 take judicial notice of -- there's actually five cases,
15 three in which the Defendant is named. All of these
16 have been before this Court and have either pled guilty
17 and been sentenced or at least pled guilty.

18 There are two other cases, I've got copies of
19 everything, I've provided the Defendant with copies of
20 these Informations and Indictments, where the Defendant
21 is an unindicted co-conspirator; and we would be
22 offering or asking that the Court take judicial notice
23 of those as well, where he directs at least five other
24 individuals, and present the police officer's testimony
25 to that effect.

1 MR. D'AMBROSIO: Well, I would object to that.
2 I don't know what the evidentiary value of an
3 Indictment is, your Honor. It's hard to say. I don't
4 know what was presented.

5 THE COURT: Well, I'm concerned about just
6 offering up an Indictment where he's named as an
7 unindicted co-conspirator, Ms. Rogers. It seems to me
8 that you've got to have some factual support for the
9 contention; and there's plenty, I think, available to
10 the Government. I've heard the guilty pleas of a
11 number of the Defendant's co-conspirators. And so it
12 seems to me that you've got plenty out there without
13 having to go to the Indictments that I haven't heard
14 about.

15 And as a result, you're claiming that his
16 offense level on Count I ought to be 32, and then you
17 argue about those two prior convictions at paragraphs
18 32 and 33 which you've advised the Court today remain
19 standing as convictions in state court.

20 MR. D'AMBROSIO: That's correct, your Honor.

21 THE COURT: Okay. Your paragraph number 7 of
22 your objection, you're making some kind of a double
23 jeopardy argument.

24 MR. D'AMBROSIO: Yes, your Honor.

25 THE COURT: I don't understand your argument.

1 What do you mean?

2 MR. D'AMBROSIO: Essentially, your Honor, that
3 the enhancement seeks to impose a multiple punishment.
4 The punishment being imposed out of these predicate
5 offenses for which he has already served time is again
6 being imposed in this case far beyond that which he
7 would otherwise suffer if it were not for those
8 predicate offenses.

9 THE COURT: Okay.

10 MR. D'AMBROSIO: That is essentially the
11 argument, Judge.

12 THE COURT: Okay. In your next objection you
13 say that, under *Booker*, you think that I have authority
14 to sentence outside the statutory mandatory sentence in
15 this case. Is that your argument?

16 MR. D'AMBROSIO: It essentially is that insofar
17 as I think one could read *Booker*, though it does not
18 precisely stand for this point, to impose an
19 affirmative obligation on the Government to produce
20 evidence of the prior convictions as a part of the
21 trial as well, and that was not done, to subject them
22 to a jury as well. That's essentially what that
23 argument is. Again, I have no case on point on that,
24 Judge.

25 THE COURT: There's a good reason why you don't.

1 That's not what *Booker* says. I don't understand your
2 objection in paragraph number 9 of your objections.

3 MR. D'AMBROSIO: Paragraph 9 and 10 are
4 essentially extrapolations of the same argument I just
5 made to the Court, which it apparently rejects.

6 THE COURT: And the same with paragraph 10?

7 MR. D'AMBROSIO: Yes, your Honor please.

8 THE COURT: Paragraph number 11, you seem to
9 concede that a collateral challenge to the underlying
10 offenses or the predicate offenses is not appropriately
11 made in this court.

12 MR. D'AMBROSIO: Yes, Judge.

13 THE COURT: And then in paragraph 12, what
14 you're trying to say is that the offenses listed in
15 paragraphs 32 and 33 are related offenses and so they
16 should be counted as one. However, the probation
17 officer I think correctly points out that there were
18 different dates of the arrests and disposition. So
19 they're not related cases under the guidelines.

20 I don't understand your claim in paragraph 13.

21 MR. D'AMBROSIO: Paragraph 13 was just a -- was
22 a request upon the Court that the proof beyond a
23 reasonable doubt standard be applied to the prior
24 convictions of this Defendant which, again, the Court
25 had earlier rejected.

1 THE COURT: I don't think that that's the law.

2 MR. D'AMBROSIO: It is not. Paragraph 13 says
3 it is not, but. . .

4 THE COURT: And then you have an Eighth
5 Amendment argument with respect to the life term.

6 MR. D'AMBROSIO: Yes, I do, Judge. That's in
7 paragraph 14.

8 THE COURT: Okay. I'll hear the Government.

9 MS. ROGERS: Your Honor, the Government intended
10 to call Detective Robert Enright to address the
11 sentencing guidelines. The Government's understanding
12 is that Count II is statutorily controlled. The
13 21 U.S.C. 851 Information enhancement has properly been
14 filed. The Defendant is not claiming it's defective in
15 any way. His claim appears to be that state
16 convictions might be modified or vacated. That's not
17 the case today. So that what we're left with really
18 is, as to Count I, the sentencing guidelines.

19 And the Government's understanding is that there
20 are basically two objections or issues that the
21 Defendant has raised, the first being his leadership
22 role, and sub issues in that are that he was directing
23 other Defendants in the drug trafficking conspiracy and
24 that his gang affiliation, that he was a leader of the
25 Latin Kings at the time he was doing this.

1 The second issue appears to be the obstruction
2 of justice. And, again, the Government is prepared to
3 put on testimony of a Providence police officer to
4 testify regarding the Defendant's offer of 200,000 for
5 his release on the date of his arrest.

6 THE COURT: I take it that you object to the
7 Defendant's claim that the mandatory life sentence in
8 this case is constitutionally defective.

9 MS. ROGERS: Yes, I do. That's not -- there's
10 no case law holding that it's unconstitutional.

11 THE COURT: You say that it has not been held
12 unconstitutional. Do you have a case that says it is
13 constitutional under the Eighth Amendment?

14 MS. ROGERS: I do not have a cite for that. The
15 Eighth Amendment cases that I'm aware of involve the
16 death penalty. This case is a life term of
17 imprisonment which the Defendant had the opportunity to
18 avoid, and it is constitutional under the statute.

19 THE COURT: How did he have the opportunity to
20 avoid it?

21 MS. ROGERS: Several offers were made prior to
22 trial, before the Information was filed.

23 THE COURT: Okay. Okay. Proceed with your
24 witnesses.

25 MS. ROGERS: The Government calls Detective

1 Robert Enright.

2 **ROBERT ENRIGHT, GOVERNMENT WITNESS, SWORN**

3 THE CLERK: Would you please state your name and
4 spell your last name for the record.

5 THE WITNESS: Robert M. Enright, E-N-R-I-G-H-T.

6 **DIRECT EXAMINATION**

7 **BY MS. ROGERS:**

8 Q. Where are you currently employed?

9 A. I'm currently employed by the Providence Police
10 Department.

11 Q. And how long have you been so employed?

12 A. Approximately 16 years.

13 Q. And were you part of the investigation that led to
14 the eventual indictment of this Defendant?

15 A. Yes, I was.

16 Q. On October 24th of 2004, were you working on that
17 day?

18 A. Yes.

19 Q. And did you have occasion to have any conversation
20 or meet with this particular Defendant on that day?

21 A. Yes, I did.

22 Q. What occurred?

23 A. Mr. Francisco was transported to the rear of
24 64 Dexter Street where I was located.

25 Q. Was he read his Miranda warnings?

1 A. Yes.

2 Q. And did he agree to, or did he waive those
3 warnings?

4 A. Yes, he did.

5 Q. And did he agree to speak with you?

6 A. Yes.

7 Q. Did he make any admissions at that time concerning
8 the Latin Kings?

9 A. He stated to myself and Detective Dwyer that he was
10 a member of the Latin Kings.

11 Q. Did you have or do you have any other evidence
12 regarding this Defendant and the Latin Kings?

13 A. There's numerous phone calls that were intercepted
14 during the Court-ordered intercept of his phone.

15 Q. We'll get to those in a minute, but is it fair to
16 say that you listened to every intercept with regard to
17 this Defendant's telephone in that investigation?

18 A. Yes, I did.

19 Q. At 64 Dexter Street, crack cocaine and powder
20 cocaine was found; is that correct?

21 A. Yes.

22 Q. Was there any other evidence located that was
23 related to the Latin Kings?

24 A. Two sets of beads were seized from that apartment.

25 Q. Showing you what's been marked Government's

1 Exhibit 1 for identification, do you recognize that?

2 A. Yes.

3 Q. What is it?

4 A. These are the two separate sets of beads that were
5 seized in Joel Francisco's apartment.

6 Q. At 64 Dexter Street?

7 A. Yes.

8 Q. Are you aware of the significance of those beads?

9 A. The Latin Kings have three primary colors, black,
10 red and gold.

11 Q. Do you know what the colors stand for?

12 A. Black stands for the knowledge of the ancient
13 leaders of the Latin Kings, red stands for the
14 bloodshed of members of the Latin Kings, and gold is
15 symbolic more or less for prosperity. It signifies the
16 sun shining down on the Latin Kings.

17 Q. Have you had an opportunity to look at the two
18 different sets of beads?

19 A. Yes.

20 Q. And is there anything that you're aware of with
21 regard to the numbering of the beads or the pattern of
22 the beads?

23 A. Yes. The pattern of the beads is consistent,
24 meaning that they have to have the same amount, two
25 separate colors on a set of beads. You can put between

1 one to five of a certain color, but next to that must
2 be the same amount of the second color.

3 In other words, on this black and red one, there
4 are three black followed by three red followed by three
5 black continuously around the whole set of beads.

6 Q. And is that one of the rules in the Latin Kings?

7 A. Yes.

8 MR. D'AMBROSIO: Objection.

9 THE COURT: Basis?

10 MR. D'AMBROSIO: Foundation.

11 THE COURT: Overruled on that basis.

12 Q. Do they appear to be in substantially the same
13 condition as when they were seized on October 24th of
14 2004?

15 A. Yes.

16 MS. ROGERS: At this time, for purposes of this
17 hearing, I would move Government's 1 as full.

18 MR. D'AMBROSIO: Objection.

19 THE COURT: Basis?

20 MR. D'AMBROSIO: Relevance.

21 THE COURT: Overruled. Government's 1 is full.

22 (Government's Exhibit 1 was admitted as a full
23 exhibit)

24 Q. Now, you indicated that you listened to every
25 intercept over the wiretap of Joel Francisco's phone

1 from July of 2004 through October of 2004. Are you
2 aware of any other co-conspirators or individuals who
3 this Defendant directed during those intercepts?

4 A. Reynaldo Rodriguez.

5 MR. D'AMBROSIO: Objection. Move to strike that
6 response. I believe the question called for a yes or
7 no response.

8 THE COURT: Just yes or no.

9 THE WITNESS: I'm sorry, your Honor.

10 A. Yes, I am.

11 Q. And were you a party to meetings where decisions
12 were made as to who to charge in this case?

13 A. Yes.

14 Q. Are you aware of the names of the other Defendants
15 that this Defendant directed?

16 MR. D'AMBROSIO: Objection.

17 THE COURT: Basis?

18 MR. D'AMBROSIO: There must be some foundation
19 for that, I think, Judge.

20 THE COURT: Overruled.

21 A. Yes.

22 Q. Who were they?

23 A. Reynaldo Rodriguez, Miguel Jusino and Joel
24 Trinidad.

25 Q. And in what context did he direct these

1 individuals, these three individuals?

2 A. He would direct them by supplying them with
3 narcotics and often ordering them where to meet him,
4 what to do.

5 Q. Were there any other individuals who he directed?

6 A. Yes.

7 Q. Who?

8 A. Pedro Hernandez, William Cifredo, Juan Guerrero.

9 Q. And in what context did he direct these
10 individuals?

11 A. In the same manner. He would inform them when he
12 had narcotics, where to meet him to get the narcotics
13 off him and several times what to do with the
14 narcotics.

15 Q. Did he also have a girlfriend at the time?

16 A. Yes, he did.

17 Q. And did he direct her in any way in the drug
18 trafficking organization?

19 A. Absolutely. His girlfriend was Julissa Jaquez.

20 Q. And what would he direct her to do?

21 A. At times he would send some of the people I already
22 mentioned over to her house. At a point in the
23 investigation, she was holding his narcotics. He would
24 inform Julissa how much, what quantity of narcotics to
25 give to the suspect he was sending to her house.

1 Q. Did he also give her any directions with regard to
2 firearms?

3 MR. D'AMBROSIO: Objection.

4 THE COURT: Basis?

5 MR. D'AMBROSIO: Leading, and I don't believe
6 it's --

7 THE COURT: I can't hear you.

8 MR. D'AMBROSIO: It's leading.

9 THE COURT: Sustained. Try not to lead your
10 witness.

11 Q. Were any documents found on October 24th, 2004?

12 A. Yes.

13 Q. And who did they relate to?

14 A. Joel Francisco.

15 Q. What were the documents, and where were they found?

16 A. They were the charter of the Latin Kings
17 organization. They were found at 230 Leah Street.

18 Q. And was that where the Defendant was originally
19 arrested?

20 A. He was arrested as he left that residence, yes.

21 Q. And you indicated there was a charter of the
22 Latin Kings membership?

23 A. Yes, more or less the rules and regulations.

24 Q. Were there any intercepts that you listened to
25 during the course of this investigation where this

1 Defendant made admissions regarding whether he was the
2 leader of the Providence Latin Kings?

3 MR. D'AMBROSIO: Objection, ask to be made more
4 specific in terms of time.

5 THE COURT: Let's get the yes or no first, and
6 then we'll try to zero in on a time. Just answer yes
7 or no.

8 A. No.

9 Q. There were no admissions by the Defendant?

10 A. Specific admissions where he stated, "I'm the
11 leader of the Latin Kings," no.

12 Q. Were there any conversations that you listened to
13 in the intercepts which gave you reason or the
14 Providence Police reason to believe that he was the
15 leader of the Latin Kings?

16 MR. D'AMBROSIO: Objection.

17 A. Yes.

18 THE COURT: Sustained. The answer may be
19 stricken.

20 Q. Did the Defendant say anything else regarding his
21 arrest after he was given Miranda warnings?

22 A. He offered to give me \$200,000 to secure his
23 release.

24 Q. And what did you do in response to that offer?

25 A. I played it up for a few minutes, but then he just

1 forgot about it, stopped it.

2 Q. And what do you mean you played it up?

3 A. I told him I was interested and how could he get me
4 the money.

5 Q. And why did you do that?

6 A. To see what he was going to say.

7 Q. And what did he say?

8 A. He stated he could get \$50,000 almost immediately
9 because he had known a subject who was looking for two
10 kilos of cocaine in exchange for \$50,000.

11 Q. And why did he say, or what did he want in return
12 for giving you \$200,000?

13 A. His freedom.

14 Q. Did he indicate that he wanted to be let go or
15 expected you to let him go and not charge him?

16 A. Yes, absolutely.

17 MS. ROGERS: If I may have one moment, your
18 Honor.

19 THE COURT: Take your time.

20 (Pause)

21 MS. ROGERS: I have no further questions at this
22 time.

23 THE COURT: Cross.

24 MR. D'AMBROSIO: Please, your Honor.

25

CROSS-EXAMINATION

BY MR. D'AMBROSIO:

Q. Detective, you testified the color -- Latin Kings colors are what?

A. Black, red and gold or yellow.

Q. And it's your testimony that these beads are related somehow to -- strike that. Is it your testimony that these beads somehow are indicative of membership in the Latin Kings?

A. Yes.

Q. Because they are red, black and gold?

A. I'm looking at the totality of the evidence. Yes, I do. Those beads specifically represent beads of the Latin Kings.

MR. D'AMBROSIO: Well -- if I may approach the witness, your Honor.

Q. Sir, can you see colors?

A. Excuse me?

Q. Can you see colors, sir?

A. Yes.

Q. You're not color blind, are you? There's blue in there, isn't there?

A. On one of the things there is -- I believe it's purple, actually, with the gold.

Q. Purple. That's not a Latin Kings color, is it?

1 A. I'm not sure. I named the three main colors of the
2 Latin Kings.

3 Q. But you testified there were three colors?

4 A. I said there were three main colors, I believe.

5 Q. Oh, there may be more?

6 A. It's possible.

7 Q. Could it be you're uncertain about what colors are
8 actually indicative of the Latin Kings?

9 A. No. I'm positive what black, red and gold stand
10 for in the Latin Kings organization.

11 Q. But you're not certain about blue?

12 A. It's purple; and no, I'm not.

13 Q. Is there any type of structure the Latin Kings use
14 in the production of their beads that you're aware of?

15 A. I don't understand the question. Can you repeat
16 it?

17 Q. Well, how did you become familiar with beads in the
18 Latin Kings?

19 A. These beads?

20 Q. Any beads.

21 A. Two ways. I talked to the -- Sergeant Michael
22 Wheeler, who is the expert of the Gang Squad in
23 Providence. He explained them to me. Secondly, I read
24 their own charter, which is right there.

25 Q. And when you read the charter, did it say anything

1 about blue or purple beads?

2 A. No, I don't believe so.

3 Q. When you read the charter, did it say anything
4 about beads?

5 A. Yes.

6 Q. And did it say anything about the denomination or
7 number of beads that should be on a specific rope of
8 beads?

9 A. I believe it said between one and five, yes.

10 Q. One and five?

11 A. I believe that's what it says.

12 Q. Did it talk about the number of beads being either
13 120 or 360?

14 A. It may have. I don't remember that part.

15 Q. Did you count these beads?

16 A. No, I did not.

17 Q. So you don't know how many beads are on each
18 strand, do you?

19 A. No. I did not count them.

20 Q. So you don't know whether these beads are actually
21 in conformance with the charter that you read earlier,
22 do you?

23 A. The only thing I know is that it matches the
24 numbers sequence that it's supposed to.

25 Q. And it kind of matches the colors?

1 A. The black and the red definitely match the colors.

2 Q. But the other part doesn't?

3 A. The separate one?

4 Q. Uh-huh.

5 A. It has gold. Like I stated, I don't know what
6 purple stands for.

7 Q. Now, you mentioned a number of people, a Reynaldo
8 Rodriguez, a Mr. Jusino, Joel Trinidad, Pedro
9 Hernandez, Juan Guerrero, Julissa Jaquez. Were you
10 involved in the investigation of all these people?

11 A. Yes.

12 Q. All of them?

13 A. Yes.

14 Q. Do you know which ones, if any, are members of the
15 Latin Kings?

16 A. I believe so.

17 Q. Which ones?

18 A. Miguel Jusino, Juan Jusino, Juan Guerrero, Pedro
19 Hernandez.

20 Q. Julissa Jaquez?

21 A. I don't think she is.

22 Q. And you based the determination that they were
23 members of the Latin Kings upon what, sir?

24 A. Well, the two Jusino brothers told me they were;
25 Juan Guerrero, through the conversations with

1 Mr. Francisco and talking with the gang unit for the
2 Providence Police and the FBI. Who was the -- Pedro
3 Hernandez was the other one?

4 Q. I'm asking you, sir.

5 A. Oh, on the telephone on numerous occasions he was
6 stating about being a Latin King member and reaching
7 out actually across the country talking to other Latin
8 King heads.

9 Q. Okay. Did he ever say that to Mr. Francisco? Do
10 you recall a conversation that Pedro Hernandez had with
11 Mr. Francisco discussing that?

12 A. No.

13 Q. Do you recall a conversation between Mr. Guerrero
14 and Mr. Francisco discussing membership in the Latin
15 Kings?

16 A. There's one phone call where Mr. Francisco more or
17 less yells at Mr. Guerrero because Mr. Guerrero allowed
18 his girlfriend to answer the telephone, breaking a rule
19 of the Latin Kings.

20 Q. Did he say, You're breaking a rule of the Latin
21 Kings?

22 A. Absolutely. He said, You know that's a rule, and
23 she's not allowed to answer your phone.

24 Q. When was that conversation, sir?

25 A. I don't have the exact date, but I believe it was

1 in September.

2 Q. Did you ever hear any conversations between
3 Mr. Jusino and Mr. Trinidad and the Defendant?

4 A. Can you break them up for me?

5 Q. Did you ever hear any conversation between
6 Mr. Jusino and the Defendant discussing the Latin
7 Kings?

8 THE COURT: Which Mr. Jusino?

9 MR. D'AMBROSIO: Miguel Jusino.

10 A. Not that I can recall.

11 Q. Do you ever recall any conversation between the
12 Defendant and Mr. Trinidad discussing the Latin Kings?

13 A. There's numerous, and I mean numerous,
14 conversations between Mr. Trinidad and Mr. Francisco
15 where Mr. Trinidad is arguing with Mr. Francisco. The
16 specific incident I can go over with you if you want.

17 Q. Well, do you recall any dates or times for these
18 conversations?

19 A. Oh, one is definitely in October, probably the week
20 before the end of the investigation.

21 Q. How many conversations do you recall Mr. Francisco
22 discussing the Latin Kings?

23 A. I'd say over a dozen.

24 Q. Twelve conversations?

25 A. Approximately.

1 Q. How many conversations were actually listened to or
2 intercepted?

3 A. On just Mr. Francisco's line? I'm not sure of the
4 exact number, but I'll take a guess, 12,000, 13,000.

5 Q. Twelve, thirteen thousand?

6 A. Approximately.

7 Q. So would it be fair to say, then, out of every
8 1,000 conversations on Mr. Francisco's line, the Latin
9 Kings may or may not have been directly or indirectly
10 referenced? Is that a fair statement?

11 A. Yes.

12 Q. And would it also be a fair statement that in those
13 12,000 or 13,000 conversations, Mr. Francisco never
14 came out and said to anyone, "I'm not a member of the
15 Latin Kings," or, "I am a member of the Latin Kings"?

16 A. He never stated either one of those things.

17 Q. So when you testified that he is a member, you were
18 surmising that; correct?

19 A. No. Once again, I'm going by the totality of all
20 the evidence.

21 Q. And that was the evidence you testified to here
22 today; correct?

23 A. And actually the Defendant told me he was a member
24 of the Latin Kings.

25 Q. You mentioned some documents that were seized at

1 Leah Street?

2 A. Yes.

3 Q. Do you know how old those documents were?

4 A. No.

5 Q. What room in Leah Street from which -- strike that.
6 What room at Leah Street where -- I'm sorry. I
7 apologize. From what room at Leah Street were they
8 seized?

9 A. I'm not sure. I didn't seize them, and I wasn't at
10 230 Leah Street.

11 Q. Any of these documents have the Defendant's name on
12 them?

13 A. There's a lot of documents there. Some of them do
14 have his name on them, yes.

15 Q. Can you tell us which ones?

16 A. No.

17 MR. D'AMBROSIO: One minute, please, your Honor.

18 (Pause)

19 Q. With respect to those beads again, those are two
20 separate strands, aren't they?

21 A. Two separate sets of beads, yes.

22 MR. D'AMBROSIO: Thank you. Nothing further,
23 your Honor.

24 THE COURT: Any redirect?
25

REDIRECT EXAMINATION

BY MS. ROGERS:

Q. Was Reynaldo Rodriguez also a member or admitted member of the Latin Kings?

A. Yes.

Q. And he was one of the individuals you referenced earlier?

A. Yes.

Q. And you mentioned on cross-examination that there was a specific conversation that you recalled between the Defendant regarding Latin Kings that occurred in October?

A. Yes, I believe so.

Q. What was that conversation?

A. He was speaking with Mr. Trinidad. Apparently the night before there had been an argument at a house where numerous Latin Kings were gathered and Mr. Francisco shot one of the suspects in the knee with a gun. Mr. Trinidad called up Mr. Francisco yelling at him about the incident. Mr. Trinidad kept saying, How could you do that to one of us? He's one of us. He's willing to bust a cap with you. He's one of us. He just kept stating that to him, and he couldn't believe that Mr. Francisco would shoot the subject over just arguing, joking around.

1 MR. D'AMBROSIO: Objection. Move to strike the
2 latter part of that response.

3 THE COURT: On what basis?

4 MR. D'AMBROSIO: I believe it far exceeds the
5 question that was asked. It became narrative at a
6 certain point, Judge.

7 THE COURT: Overruled.

8 Q. Did you listen to any conversations -- strike that.
9 Were any documents seized with regard to the Latin
10 Kings changing some of their rules on how they would
11 communicate to avoid detection by law enforcement?

12 A. Can you repeat that?

13 Q. Are you aware of any evidence in this case where
14 the Latin Kings, after trials took place, changed
15 certain methods of communicating or following rules to
16 avoid detection?

17 A. Yes.

18 MR. D'AMBROSIO: Objection.

19 THE COURT: Just a minute. Sustained. The
20 answer may be stricken.

21 Q. Now, the cross-examination included questions with
22 regard to only one, perhaps, in a thousand phone calls
23 referencing the Latin Kings. In this case --

24 THE COURT: Ms. Rogers, quite honestly, I have
25 to tell you, and I don't know, Mr. D'Ambrosio as well,

1 this isn't a racketeering case. This isn't a case
2 brought under the Street Gangs Act. Whether or not the
3 Defendant has an affiliation is something that the
4 Bureau of Prisons is going to be concerned about, but
5 it certainly doesn't affect his guideline range.

6 MS. ROGERS: Then I'll stop asking questions.

7 THE COURT: So I don't know why we're going down
8 that road. It doesn't affect the guidelines sentence
9 in this case.

10 MS. ROGERS: The Government has no further
11 questions.

12 THE COURT: Do you have any follow-up?

13 MR. D'AMBROSIO: Are you aware the Defendant --
14 I'll withdraw it. Nothing further, Judge.

15 THE COURT: Okay. Step down.

16 THE WITNESS: Thank you, your Honor.

17 THE COURT: Does the Government have any other
18 witnesses?

19 MS. ROGERS: No, your Honor.

20 THE COURT: Okay. Does the defense wish to put
21 on any witnesses?

22 MR. D'AMBROSIO: No, your Honor.

23 THE COURT: Okay. I'll hear the Government.

24 MS. ROGERS: Are you looking for argument or the
25 sentencing recommendation based on the testimony?

1 THE COURT: At this point just argument on the
2 impact of the testimony you've presented as it relates
3 to the objections raised by the Defendant to the
4 pre-sentence report.

5 MS. ROGERS: As stated earlier, the Government's
6 view on the Defendant's objections basically distill
7 down to two, the first being leadership role.

8 Detective Enright has testified that this
9 Defendant directed five or more other Defendants, five
10 of which were Latin King members, and had them either
11 store drugs, narcotics for him, supplied them with
12 narcotics or told them where to go; and in this sense,
13 that burden has been met, the leadership role has been
14 met.

15 With regard to the gang affiliation, as the
16 Court has pointed out, whether he's actually a member
17 of the Latin Kings is a decision for the Bureau of
18 Prisons. However, the evidence is that there were
19 other members of Latin Kings and that he was directing
20 them, which in this context a reasonable inference is
21 that he was the head of the Latin Kings in the
22 Providence area at the time of his arrest.

23 The Defendant also admitted to being a member of
24 the Latin Kings. And Government's Exhibit 1, there are
25 two sets of beads, one gold and purple, the other red

1 and black, and the Detective testified that the red and
2 black is without a doubt in his mind significant of
3 Latin King membership. It matches the colors of the
4 Latin Kings, red and black; and the beads are in the
5 correct sequence and numbering, three beads of each
6 color in sequence.

7 The second issue is obstruction of justice. The
8 detective testified that on the day of his arrest, the
9 Defendant offered the Providence Police \$200,000 for
10 his arrest. Again, the Government believes that this
11 testimony was adduced at trial; but at this point the
12 officer has testified again, and the Government's
13 argument is the same as probation's, that this
14 constitutes obstruction of justice where he offered in
15 order to obstruct the investigation of the case and his
16 arrest by seeking release basically by bribing or
17 attempting to bribe the Providence Police.

18 MR. D'AMBROSIO: Your Honor, may it please the
19 Court, I don't recall any testimony elicited this
20 morning which would lead the Court to believe that this
21 Defendant had any more than a passing affiliation with
22 the Latin Kings, let alone being a leader or organizer
23 of the Latin Kings.

24 The testimony offered was, again, that out of
25 thousands of conversations, there may have been some

1 with -- that either alluded to or the name Latin King
2 may have been represented.

3 However, when specifically asked whether this
4 Defendant stated he was a member of the Latin Kings or
5 denied being in that membership, the detective could
6 not recall but did specifically deny being a leader.
7 There was no testimony as to him being a leader.

8 The Government offers its exhibit, a series of
9 beads which actually are inconsistent with the
10 detective's own testimony as to the colors affiliated
11 with the Latin Kings.

12 Moreover, your Honor, the Government sought or
13 alluded to, through the testimony of the witness, as to
14 certain documents seized, as to certain charters, rules
15 and regulations seized. These documents, the detective
16 could not state from where they were seized, the date
17 or remoteness in time of the seizure or when the
18 documents were produced. And most significantly of
19 all, your Honor, these documents were not introduced
20 into evidence for the Court's perusal or consideration.

21 What the Court has left to consider is the
22 testimony of the detective which the Defendant would
23 posit is, at best, equivocal in terms of the
24 affiliation of the Defendant with the Latin Kings and,
25 moreover, is downright contrary to any assumption of

1 leadership by the Defendant within that organization.

2 For all those reasons, we ask that that
3 enhancement be denied to the Government.

4 THE COURT: What enhancement?

5 MR. D'AMBROSIO: I am -- the adjustment. I'm
6 sorry, Judge, the finding of --

7 THE COURT: The adjustment for an aggravating
8 role --

9 MR. D'AMBROSIO: The adjustment for an
10 aggravating role.

11 THE COURT: -- is not dependent upon whether or
12 not he's affiliated with a gang.

13 MR. D'AMBROSIO: I understand that, Judge.

14 THE COURT: That adjustment is made pursuant to
15 the number of other individuals who were involved in
16 the drug trafficking activity. Do you want to address
17 that?

18 MR. D'AMBROSIO: In terms of the drug
19 trafficking activity, in terms of the individuals
20 indicated, the Court should note that there was no one
21 overall Indictment of these individuals.

22 The Government offered a series of Indictments
23 for the Court's consideration, again, Indictments
24 pertaining with little evidentiary value. However, the
25 named affiliations of these individuals in terms of

1 whether this Defendant exercised control is, again,
2 speculative.

3 The Defendant may have had affiliations with
4 other people, but whether he was exercising them within
5 a leadership hierarchy or position of authority, again,
6 the evidence is bereft in that respect. There may have
7 been a series of -- excuse me, a series of individual
8 actions, but whether these were all coordinated or
9 whether they were set up in such a manner as to place
10 the Defendant in a leadership posture, again, I would
11 posit is speculative at best.

12 And for all these reasons, we refer to our
13 objections previously filed, Judge. Thank you.

14 THE COURT: Do you want to talk about
15 obstruction?

16 MR. D'AMBROSIO: Judge, I think -- the basis for
17 the objection to the pre-sentence report was because I
18 had believed -- I did not recall hearing that testimony
19 at trial. It may have been offered. Based on that
20 testimony, I did not cross-examine on that particular
21 ground.

22 All I would say, again, is that it was not
23 brought before the jury. It's being brought before the
24 Court today. I would argue that it should have been
25 brought before the jury if that enhancement is being

1 sought. Other than that, I have no further objection.

2 THE COURT: Ms. Rogers, I have a question for
3 you with respect to this particular Indictment and the
4 inclusion of the four-level increase for an aggravating
5 role as it pertains to Count I. Count I of this
6 Indictment names this Defendant alone.

7 MS. ROGERS: Yes.

8 THE COURT: And charges him with knowingly and
9 intentionally possessing with intent to distribute the
10 500 grams or more of cocaine.

11 The guideline talks about his role in that
12 offense. There's not a conspiracy charged. There are
13 not Co-Defendants charged in that particular count of
14 the Indictment. So I guess what I'm asking you is, how
15 do we assign him a leadership role in an offense where
16 he is the only person charged?

17 The Government, it seems to me, and
18 Mr. D'Ambrosio makes the point, did not indict all of
19 these individuals together. The Government saw fit --
20 in fact, in Mr. Francisco's case, he's got three others
21 pending where he's named with other individuals, and
22 those matters are scheduled to be tried; but this is
23 one Indictment charging him with one date in October of
24 2004 with possessing in excess of 500 grams of cocaine.

25 MS. ROGERS: The Government --

1 THE COURT: So how do you include the five
2 others?

3 MS. ROGERS: The Government did not indict in an
4 overarching conspiracy because of the wheel-and-spoke
5 conspiracy case law where the Government admits it
6 would have had difficulty proving that the other
7 co-conspirators that surrounded this Defendant were
8 aware of each other and were working in concert with
9 each other.

10 However, the Government's position is still that
11 the evidence shows this Defendant directed each of the
12 co-conspirators individually and that he is chargeable
13 or held accountable under the relevant conduct portion
14 of the United States Sentencing Guidelines where this
15 particular case that went to trial involved a large sum
16 of crack cocaine and a significant sum of cocaine. He
17 clearly was involved --

18 THE COURT: Those were the seizures that were
19 made on October 24th?

20 MS. ROGERS: Yes, and the evidence at trial
21 showed that he was in the business of distributing that
22 cocaine, crack and powder, throughout the term of the
23 wiretap, which encompassed July through October of
24 2004.

25 THE COURT: Okay.

1 MS. ROGERS: And all of the Indictments involved
2 activity that occurred in that same time period and
3 involved conversations or part of the proof --

4 THE COURT: I understand that this was part of a
5 wiretap investigation and that there were a number of
6 other people, and I've sentenced a number of other
7 people who were heard on those wiretaps in conversation
8 with this Defendant.

9 But the concern that I have is that in the
10 vehicle that you've used here, he's got one offense on
11 one date. And what you're saying to me, I guess, is
12 that looking at the relevant conduct, I take into
13 account all of the other individuals, and that's how
14 the enhancement applies.

15 MS. ROGERS: That's the Government's position.

16 THE COURT: Did you want to address that
17 further?

18 MR. D'AMBROSIO: No, your Honor.

19 THE COURT: Okay. I'll rule on each of the
20 Defendant's objections as they relate to the guidelines
21 calculations with respect to Count I starting with his
22 first one, that is, that the indication in the
23 pre-sentence report that the cases of William Cifredo,
24 David Batista and Miguel Jusino are related cases. As
25 I said, that one does not affect the guidelines range

1 at all.

2 With respect to the second objection, and that
3 is as to whether or not the Defendant admitted that he
4 was a member of the Latin Kings, we have heard now the
5 testimony of Officer Enright who has testified here
6 today under oath that on the date of the Defendant's
7 arrest, he admitted to Officer Enright that he was a
8 member of the Latin Kings organization. And so I find
9 that testimony to be both credible and undisputed in
10 this case.

11 As to whether or not this Defendant was the
12 leader or not the leader, I don't know whether he was
13 or he wasn't; but he certainly has admitted that he was
14 a member of that organization, and so the reference to
15 his affiliation that is contained in the pre-sentence
16 report shall stand.

17 With respect to the two-level increase that the
18 probation officer included for obstruction of justice
19 pursuant to 3C1.1 of the guidelines, again, Officer
20 Enright testified here today that on the date of his
21 arrest, this Defendant offered a substantial sum of
22 money to the arresting officer to let him go.

23 The Defendant named the number of \$200,000 and
24 told Officer Enright that he had \$50,000 of it in
25 earnest money if the officer would permit him to leave,

1 thereby giving him an opportunity to flee.

2 And under the guideline, certainly the
3 Defendant's attempt to bribe the arresting officer
4 would have obstructed or impeded the administration of
5 justice during the investigation and prosecution of
6 this Defendant, and so that two-level increase I find
7 was properly added.

8 With respect to the four-level increase included
9 by the probation officer at paragraph number 17, that
10 four-level increase was added pursuant to Guideline
11 3B1.1, which is entitled "Aggravating Role." And it
12 says that based on the Defendant's role in the offense,
13 that the Court should increase the offense level
14 pursuant to subsection (a). If the Defendant was an
15 organizer or leader of a criminal activity that
16 involved five or more participants or was otherwise
17 extensive, then his offense level should be increased
18 by four levels.

19 And the application note goes on to define who
20 is a participant, and it includes a person who is
21 criminally responsible for the commission of the
22 offense but need not have been convicted.

23 Application Note 2 says that to qualify for this
24 adjustment, the Defendant must have been the organizer,
25 leader or manager of one or more participants; and here

1 the Court has heard testimony that this Defendant gave
2 direction to at least five other individuals who were
3 also engaged in drug distribution.

4 Officer Enright has testified to having listened
5 in on conversations that this Defendant had with at
6 least five other individuals where he would tell those
7 individuals where the drugs were stored, how to access
8 them and where to make deliveries or where to make
9 pick-ups, as the case may be.

10 The probation officer, as I said, included this
11 enhancement because it appeared from the prosecution
12 version that this Defendant had control over other
13 individuals in the course of his drug dealing activity.

14 I find that the enhancement was properly
15 assessed against the Defendant given the fact that
16 there were at least five other individuals with whom he
17 was conversing over the telephone, who were receiving
18 direction from him in the same activity that he stands
19 convicted of here in Count I, and that is the
20 possession with intent to distribute in excess of
21 500 grams of cocaine. So the offense level was
22 properly determined to be 38 for the offense in
23 Count I.

24 The Defendant has correctly pointed out that in
25 *United States v. Booker*, the Supreme Court has directed

1 sentencing Courts to look at the guidelines in an
2 advisory capacity. All of his arguments with respect
3 to a requirement under *Booker* that the Court has to
4 make these determinations pursuant to a -- the standard
5 of beyond a reasonable doubt or that these
6 determinations should have been made by a jury I think
7 have been addressed in *Booker*.

8 The Supreme Court in finding that the guidelines
9 were advisory dispensed with the notion that those
10 sorts of sentencing enhancements would have to be found
11 by a jury beyond a reasonable doubt, and so the Court
12 has made those determinations here today under the
13 lesser standard of preponderance of the evidence in
14 accordance with *Booker*.

15 In this case, the guidelines calculation is
16 almost academic. This Defendant, by virtue of two
17 prior convictions and the Government's filing of a
18 sentencing enhancement Information pursuant to Title 21
19 of the United States Code, Section 851, and his
20 conviction on Count II of the Indictment, is subject to
21 a mandatory life sentence.

22 And so I'll hear the Government now on sentence.

23 MS. ROGERS: As to Count I, under the
24 guidelines, the Government is recommending a 360-month
25 term imprisonment, which is the low end of the

1 guidelines. There is a mandatory \$100 special
2 assessment, and the Government is recommending the
3 eight years' supervised release. Again, as the Court
4 has pointed out, it is probably academic.

5 As to Count II, by statute, the Government is
6 recommending the mandatory life term imprisonment.
7 There is no term of supervised release imposed on a
8 life imprisonment sentence. However, the \$100 special
9 assessment is mandatory for a total of \$200.

10 Probation has reviewed this Defendant's
11 finances, and it does not appear that he has the
12 financial wherewithal to pay a fine; and where he is
13 facing lifetime incarceration, a fine would be also
14 academic. So the Government is not recommending that a
15 fine be imposed.

16 THE COURT: Mr. D'Ambrosio.

17 MR. D'AMBROSIO: Yes, your Honor. With respect
18 to Count I, the Defendant would ask that this Court
19 impose a sentence at the low end of the guidelines or
20 even below it if the Court would deem fit in view of
21 the rather serious ramifications that are attended to
22 imposition of sentence at Count II.

23 Again, the term of supervised release as such,
24 again, may or may not be a moot point; but, again, we
25 would ask for the lowest possible term under that

1 statute -- under the appropriate guideline.

2 Your Honor, with respect to Count II, the
3 Defendant would renew his objection to the imposition
4 of sentence in that term for the reasons set forth in
5 his earlier memorandum, that the sentence sought to be
6 imposed is grossly disproportionate to the criminality,
7 the criminal culpability of this Defendant and his
8 prior offenses.

9 The record should reflect that this Defendant
10 was -- possessed a small amount of cocaine, both simple
11 possession charges, in state court seven or eight years
12 ago; and those two prior predicate offenses converted
13 what would have been, while a lengthy sentence, into a
14 lifetime -- into a potential lifetime imprisonment
15 situation.

16 It seems, out of a basic sense of fairness or
17 justice, that Congress could not have actually
18 importuned to create this situation. It appears to be
19 one where, although the statute speaks of felony drug
20 offenses, it strikes the Defendant as particularly odd
21 that while these two prior offenses were state
22 felonies, they may have been federal misdemeanors under
23 the analogue federal provision.

24 Again, we would just ask this Court to consider
25 the proportionality of the sentence to be imposed on

1 Count II and if the Court were to find that the penalty
2 authorized by statute cannot pass constitutional
3 muster. Thank you, your Honor.

4 THE COURT: Mr. Francisco, before I impose
5 sentence, is there anything you would like to say?

6 MR. D'AMBROSIO: Your Honor, I've discussed this
7 with the Defendant. Insofar as he still has three
8 pending cases, he determined that he does not wish to
9 make any statements to the Court today. Is that
10 correct?

11 THE DEFENDANT: Yes.

12 THE COURT: You're waiving your right of
13 allocution?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: Mr. Francisco, this is an incredibly
16 impossible situation. You are a highly intelligent
17 individual. You come from a family that is intact.
18 Are those all your family members back there?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: They're hard-working people who
21 tried to show you how to live a law-abiding life. They
22 still care about you. They're here. Even knowing what
23 sentence I have to impose today, they're here. That's
24 something that most Defendants who stand where you are
25 on the day of sentencing don't have. Most people who

1 come through here are here because they don't -- they
2 didn't have a family that cared about them and so they
3 turned to the streets.

4 I don't know what it is that made you turn to
5 the streets. I don't know why, after going through the
6 Ocean Tides program, that you didn't turn it around.
7 That was a good program. You got your GED there or you
8 got your high school diploma there?

9 THE DEFENDANT: High school diploma.

10 THE COURT: You got a high school diploma.
11 You're no dummy. You even started college. What a
12 waste. What a waste.

13 The guidelines in this case, as Mr. D'Ambrosio
14 has said, and I'm talking now about Count I because
15 Count I is controlled by the guidelines, even Count I,
16 frankly, the guideline sentence is a sentence that I
17 would not impose.

18 The low end of that guideline range calls for a
19 sentence of 30 years. The most amount of time you ever
20 got in state court, and most of the sentence was
21 suspended, was 20 years. So under *Booker*, I would not
22 be inclined to follow the guidelines.

23 Section 3553 talks about a sentence that is --
24 that the sentence imposed should be sufficient, but not
25 longer than necessary, to accomplish the goals of

1 sentencing, which here are to punish, to deter, that
2 is, to keep you and others from committing the same
3 kinds of offenses, and at the same time to keep you
4 from doing what you were doing, protect the public from
5 you because you're a public health menace. You're out
6 there purveying poison.

7 The sentence also has to promote respect for the
8 law. And when I see a guideline range that starts at
9 30 years and goes to life, I really start to wonder
10 whether that sentence would promote respect for the law
11 because it has to make sense even to you.

12 And so I have to say that 360 months, which is
13 based essentially on the types of drugs involved here,
14 but I think it's universally thought by those of us who
15 are in the sentencing business that to base a sentence
16 on an artificial factor like the amount of drugs
17 involved just doesn't make sense, that what we really
18 ought to be doing is looking at the offender, and
19 you're no angel.

20 I'm saying this to you, Mr. Francisco, because I
21 don't know what will happen. I assume you're going to
22 take an appeal, and I would encourage you to do so. I
23 don't know what's going to happen; but if by some
24 chance you end up getting out, I would hope that you
25 take what I say here today to heart because you have

1 the ability to turn it around, you have the ability to
2 fly straight, you have the ability to be a productive
3 member of society if you just turn around and do what
4 the people who are sitting in the back of the courtroom
5 have been telling you to do for the past 10 years while
6 you've been trying to be a tough guy out there on the
7 streets.

8 And so the sentence that I would impose that I
9 think is more than adequate to accomplish the factors
10 that are set forth in 3553, that I think does promote
11 respect for the law, is a sentence of 180 months on
12 Count I. And I say that, as I said, because you have
13 to see some light at the end of the tunnel, and a
14 sentence of 180 months does just that.

15 It stops you from selling drugs, so it protects
16 the public from you. It will maybe ring home to you
17 that you can't do this, and at the same time it will
18 punish you; but it also leaves open, like I said, that
19 light at the end of the tunnel so that you can make up
20 your mind while you're in prison serving that sentence
21 to clean up your act, get yourself some job training so
22 that when you get out you can be a productive member of
23 society.

24 That's the sentence I would impose. I have to
25 impose the \$100 special assessment on that count, and I

1 would impose a sentence of five years of supervised
2 release with respect to Count I. I guess it calls for
3 not less than eight. Is that right, Barry?

4 THE PROBATION OFFICER: Yes, your Honor.

5 THE COURT: So I have to impose the eight years
6 of supervised release on Count I. The problem,
7 Mr. Francisco, is that Count II. This is not my
8 sentence. This is the sentence of Congress. This was
9 a sentence that was decided before you committed the
10 offense.

11 This was a sentence, in effect, that you gave
12 yourself by doing two things, one, committing the
13 offense and, two, forcing the Government to file the
14 enhancement. So in a sense you chose the life
15 sentence, and I don't know whether you regret that
16 today or not. I suspect you do. But whatever
17 motivated you to take that path, you'll have to
18 reconcile that in your own mind.

19 And so with respect to Count II, in accordance
20 with the law, I must impose a sentence of life
21 imprisonment. I must also impose the \$100 special
22 assessment. I impose no fine on either count since I
23 find the Defendant does not have the ability to pay a
24 fine, and I impose no supervised release on Count II
25 because of the life term.

1 Now, Mr. Francisco, you have a right to appeal
2 the sentence I've imposed. As I said, I would
3 encourage you to file an appeal. I don't know whether
4 you're going to prevail on appeal. Your lawyer here
5 has argued that the mandatory life sentence is a
6 violation of your constitutional rights.

7 Unfortunately for you, the case law up until now
8 does not support that claim; but you have nothing to
9 lose at this point, and so I would suggest that you
10 file your appeal.

11 If you cannot afford an attorney to file that
12 appeal for you, you should advise the Court, and
13 counsel will be appointed. Do you understand that?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: You also have only 10 days from
16 today within which to file that Notice of Appeal. If
17 you fail to file the Notice of Appeal within 10 days,
18 you will have lost your right to take an appeal. Do
19 you understand that?

20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: Mr. Francisco, I don't know what
22 else to tell you. As I said, the sentence that I've
23 had to impose here today I have had to impose because I
24 swore an oath to uphold the law, and I swore that oath
25 to uphold the law whether I agree with the law or not.

1 I do not make the law.

2 But you got the sentence that the law requires
3 today, as I said, by virtue of the choices you made in
4 this case and the choices you made in your life.

5 Anything further from the Government?

6 MS. ROGERS: No, your Honor.

7 THE COURT: Counsel?

8 MR. D'AMBROSIO: Your Honor, would the Court
9 consider a recommendation to the Bureau of Prisons that
10 the Defendant be kept in custody in the northeastern
11 United States?

12 THE COURT: Well, I'll make a recommendation
13 that he be placed in a facility that is near Rhode
14 Island so that he may maintain contact with his family.

15 MR. D'AMBROSIO: Thank you, your Honor.

16 THE COURT: That's the best I can do. I'd like
17 to see counsel in chambers.

18 (Adjourned)

19

20

21

22

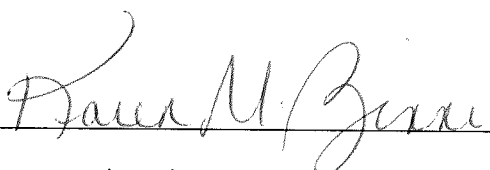
23

24

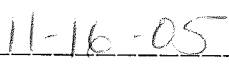
25

C E R T I F I C A T I O N

I, Karen M. Zinni, RPR-RMR-CRR, do hereby
certify that the foregoing pages are a true and
accurate transcription of my stenographic notes in the
above-entitled case.



Karen M. Zinni, RPR-RMR-CRR



Date

KAREN M. ZINNI, RPR-RMR-CRR